the breach of the fiduciary obligation rather than from the contract itself and being thus created by operation of law is expressly excepted from the terms of the Statute.[18] It would seem, therefore, that the application of the Statue of Frauds in such cases is to be justified only by the adoption of the above mentioned liberal interpretation, a view which, it must be admitted, aproaches judicial legislation.[19] As the general tendency, however, has always been to restrict its application, the recent case of *Hardin* v. *Hardin* (S. D. 1911) 129 N. W. 108, in allowing the plaintiff to prove an oral agreement of partnership for the location of mining property and thus to establish his interest in certain mines which had been acquired by the defendant in fraud of this agreement, would seem to have adopted an interpretation more correct on principle as well as in accord with the decisions in its own and the great majority of jurisdictions.[20]

EFFECT OF THE REPEAL OF A STATUTE UPON PENDING ACTIONS.—It is often broadly stated that after a statute has been repealed without a saving clause it must be considered, except as to transactions which are passed and closed, as though it had never existed.[1] This general rule must be conceived, however, as qualified by the principle that rights which have vested under the statute are not ordinarily interfered with by the repeal.[2] Regarded as a rule of construction for determining whether or not the legislature intended the act to have a purely prospective effect,[3] this limitation is not only beyond criticism, but, in view of the hardship consequent upon the enactment of any retrospective law, is highly to be commended; and in an effort to find this beneficent intent, the courts have even gone so far as to do violence to the language of the repealing act.[4] Many cases, however, contain strong intimations that this rule goes to the power rather than to the intention of the legislature.[5] Unless the term vested rights, as thus used, be confined to rights protected by the State or Federal Constitutions, this position is clearly untenable, for state legislation is restricted only by the limitations contained in those instruments,[6] and in spite of assertions to the contrary,[7] is not subject to judicial annulment simply

[18]Kayser *v.* Maughan (1885) 8 Colo. 232; see Dale *v.* Hamilton (1846) 5 Hare 369; Hodge *v.* Twitchell (1885) 33 Minn. 389.

[19]See Henderson *v.* Hudson *supra.*

[20]See Marsh *v.* Davis (1883) 33 Kan. 326, and Gray *v.* Smith (1889) L. R. 43 Ch. Div. 208, in regard to the sale of an interest in an existing partnership, the assets of which consist in part of realty.

[1]Surtees *v.* Ellison (1829) 9 B. & C. 750.

[2]See Washburn *v.* Franklin (N. Y. 1861) 35 Barb. 599; Curtis *v.* Leavitt (1857) 15 N. Y. 9, 152; C. & L. R. R. Co. *v.* Kenton County Court (Ky. 1851) 12 B. Mon. 144.

[3]See Newsom *v.* Greenwood (1871) 4 Ore. 119; Hitchcock *v.* Way (1837) 6 A. & E. 943. *Cf.* Bates *v.* Stearns (N. Y. 1840) 23 Wend. 482.

[4]Gillmore *v.* Shooter (1678) 2 Mod. 310; Craies, Statute Law (2nd ed.) 352, 353.

[5]See Washburn *v.* Franklin *supra;* C. & L. R. R. Co. *v.* Kenton County Court *supra;* Mitchell *v.* Doggett (1847) 1 Fla. 400.

[6]Cooley, Constitutional Limitations (7th ed.) 239, 240, 241.

[7]See Goshen *v.* Stonington (1822) 4 Conn. 209; Fletcher *v.* Peck (1810) 6 Cranch 87; Danville *v.* Pace (Va. 1874) 25 Gratt. 1.

because the court conceives it to transgress justice or to violate the social compact.[8] Except, therefore, in so far as the above mentioned rule of construction is thereby brought into operation, the mere fact that a right is vested furnishes no absolute criterion for determining whether or not it will survive the repeal.[9] This result has apparently been reached by the courts of England, where there are no constitutional restraints to be considered in interpreting acts of Parliament.[10]

The scope for the application of this principle to the repeal of enactments under which actions are pending is nevertheless limited. For example, since the State has no vested right in a criminal prosecution, all such actions are necessarily terminated,[11] on the theory, it is said, that the repeal operates as a legislative pardon,[12] though possibly the underlying explanation is to be found in the characteristic tenderness of the common law toward persons accused of crime.[13] Closely akin to cases of this sort, as being in the nature of a punishment, are actions for statutory penalties. These are likewise defeated,[14] because a repeal before actual recovery of the penal sum is in itself a remission of the penalty,[15] even though it was to accrue to an individual rather than to the State,[16] and because, moreover, the statute under which the action is brought confers no vested right until a final judgment is obtained thereunder.[17] Similarly, wherever the original right of action is a mere privilege accorded by the State,[18] or where the court before which the proceedings are pending derives its jurisdiction solely from the statute repealed,[19] there is no vested right requiring a prospective construction, for the plaintiff's recovery, in either instance, hinges merely upon the anticipation of the continuance of the existing law. Of course, even where the statute is of such a character that its repeal must terminate actions pending under it, such repeal will not affect suits brought to enforce an independent right which has accrued under the authority of that act, as, for instance, one arising out of a contract, the obligation of which cannot be impaired by subsequent

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[8]Baugher *v.* Nelson (Md. 1850) 9 Gill 299; see Musgrove *v.* V. & N. R. R. Co. (1874) 50 Miss. 677.

[9]Satterlee *v.* Mathewson (1829) 2 Pet. 380; see Butler *v.* Palmer (N. Y. 1841) 1 Hill 324.

[10]Gwynne *v.* Drewitt L. R. [1894] 2 Ch. 616; Sedgwick, Stat. and Const. Law 191; Craies, Statute Law (2nd ed.) 123, 351, 352.

[11]Commonwealth *v.* Duane (Pa. 1809) 1 Binn. 601.

[12]Wharton *v.* State (Tenn. 1867) 5 Cold. 1.

[13]See Eastman *v.* County of Clackamas (1887) 32 Fed. 24; State *v.* Addington (S. C. 1831) 2 Bailey 516.

[14]Union Iron Co. *v.* Pierce (1869) 4 Biss. 327; Cushman *v.* Hale (1895) 68 Vt. 444.

[15]Maryland *v.* B. & O. R. R. Co. (1845) 3 How. 534.

[16]Bank of St. Mary's *v.* State (1853) 12 Ga. 475; Pope *v.* Lewis (1842) 4 Ala. 487.

[17]Pope *v.* Lewis *supra.*

[18]*Ex parte* Alabama (1875) 52 Ala. 231.

[19]Assessors *v.* Osbornes (1869) 9 Wall. 567; Harrison *v.* Smith (1875) 2 Colo. 625. But if the appellate court might take original jurisdiction over the subject matter, the party by appearing after the repeal will thereby waive all objections to its jurisdiction over the person. Smith *v.* District Court (1878) 4 Colo. 235.

legislation.[20] Whether other civil actions generally, founded upon statute, should fall with the bare repeal, is a question upon which the courts are not in harmony. Many of them seem to favor the broad rule that any such cause of action must be cut off by the repealing act.[21] It would seem, however, that a person to whom the legislature has purported to give a substantive right,[22] as distinguished from a mere remedy,[23] has, upon the happening of the event which enables him to sue for its protection, such a vested interest as to deter the court from giving a retrospective construction to the repealing statute.

Inasmuch as it is well settled that a repeal cannot be held to operate retroactively with reference to a suit which has proceeded to final judgment,[24] it becomes of importance to determine at precisely what time an action may be considered as having been thus concluded. In criminal actions this point is reached not merely upon the conviction of the accused,[25] but when sentence is imposed,[26] while in actions of a civil nature, the judgment cannot be regarded as final so long as proceedings taken for its review by an appellate court are pending.[27] An important qualification of this principle, however, was recently made by the Supreme Court of California, in the case of *People* v. *Bank of San Luis Obispo* (Cal. 1911) 112 Pac. 866, where it appeared that a statutory action to force the defendant into involuntary liquidation had been successfully prosecuted to judgment. The defendant's motion for a new trial having been overruled, an appeal was taken pending which the legislature repealed the act under whose authority the original action had been instituted. The court refused to concede that simply because the ultimate fate of the motion for a new trial was undetermined at the time of the repeal, the original suit must be considered as still pending, and, basing its decision on the ground that such a motion was a purely collateral proceeding which did not suspend the operation of the judgment, held that the action was not affected by the repeal. This distinction between collateral and direct measures for the review of a judgment is one which commends itself to reason, and, in view of the peculiar character of that motion in California, would seem to have been properly applied.

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[20]State *v.* Williams (1895) 10 Tex. Civ. App. 346; Grey's Ex'r. *v.* Mobile Trade Co. (1876) 55 Ala. 387; State *v.* Boies (1856) 41 Me. 344.

[21]Curran *v.* Owens (1879)15 W. Va. 208; Van Inwagen *v.* Chicago (1871) 71 Ill. 31; Board *v.* Ruckman (1877) 57 Ind. 96.

[22]Taylor *v.* Woodward (1858) 10 Cal. 90; Peters *v.* Goulden (1873) 27 Mich. 171; Culpepper *v.* Railway Co. (1897) 90 Tex. 627; see Eastman *v.* County of Clackamas *supra.*

[23]Wanser *v.* Atkinson (1881) 43 N. J. L. 571; South Carolina *v.* Gaillard (1879) 101 U. S. 433; National Bank *v.* Williams (1896) 38 Fla. 305. Of course a remedy, though purely statutory, cannot be altered or taken away where this results in the impairment of the obligation of a contract. Blakemore *v.* Cooper (1905) 15 N. D. 5; 10 COLUMBIA LAW REVIEW 654.

[24]Osborn *v.* Sutton (1886) 108 Ind. 443; see Key *v.* Goodwin (1830) 4 M. & P. 341; Musgrove *v.* V. & N. R. R. Co. *supra;* Washburn *v.* Franklin *supra.*

[25]Hartung *v.* People (1860) 22 N. Y. 95.

[26]State *v.* Addington *supra.*

[27]See Musgrove *v.* V. & N. R. R. Co. *supra;* W. U. Tel. Co. *v.* Smith (1895) 96 Ga. 569.